Supreme Court, U.S.
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(1)

No. 04-513

In The Supreme Court of the United States

KEITH WAI KEUNG NG,
ALSO KNOWN AS KEITH ENG,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI
with Appendix

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October, 2004

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QUESTIONS PRESENTED

1. Did the Sixth Circuit err when it denied a certificate of appealability on petitioner's claims of ineffective assistance of counsel?

2. Did the Sixth Circuit err when it denied a certificate of appealability on petitioner's claim that his conviction violated due process?

PARTIES TO THE PROCEEDINGS

PETITIONER

- Keith Wai Keung Ng. Petitioner is an individual and has no corporate affiliations.

RESPONDENT

The United States of America.

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Petitioner Keith Wai Keung Ng respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered on July 8, 2004.

OPINION BELOW

On July 8, 2004, the Sixth Circuit Court of Appeals issued an unpublished opinion denying Petitioner a certificate of appealability to pursue his appeal of the district court's denial of his Motion to Vacate his conviction pursuant to 28 USC §2255. A copy of the Sixth Circuit's opinion is attached as Appendix A. The Order and Judgment of the District Court for the Eastern District of Michigan denying Petitioner relief and denying the Certificate of Appealability are attached as Appendix B and C, respectively.

JURISDICTION

This Court's jurisdiction is invoked under Title 28, United States Code §1254(1). The jurisdiction of the Court of Appeals was invoked under Title 28, United States Code §1291 and §2253(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONSTITUTION, AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury ... nor be deprived of life, liberty, or property, without due process of law ...

U.S. CONSTITUTION, AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right . . . to have Assistance of Counsel for his defense.

STATEMENT OF FACTS

Petitioner was convicted after a jury trial in the Eastern District of Michigan of three counts of using interstate commerce facilities (here, the telephone) with the intent to commit a single murder for hire in violation of 18 USC §1958. Petitioner was sentenced on September 11, 2000 to 120 months imprisonment on Count 1, one month imprisonment on Count 2 consecutive to Count 1, and 1 month imprisonment on Count 3, consecutive to Count 2, for a total sentence of 122 months.

Petitioner timely appealed his convictions to the Sixth Circuit Court of Appeals. Petitioner raised the following issues on direct appeal: (1) The district court abused its discretion in denying Petitioner's Motion to Consolidate the three counts as multiplicitous; (2) the facts established entrapment as a matter of law; (3) Petitioner should have been awarded a two-level reduction in his offense level for acceptance of responsibility; (4) the district court should have departed downward from the guideline range on the grounds of imperfect entrapment; and (5) Petitioner's trial counsel was ineffective for failing to move for a new trial based on newly discovered evidence. The Sixth Circuit addressed Petitioner's first four appellate claims on the merits and denied relief. The Sixth Circuit declined to review Petitioner's claim of ineffective assistance of counsel because the record was not adequately developed. *United States v Ng*, Sixth Circuit

Court of Appeals docket # 00-2098, 2001 WL 1631416 (unpublished, 12/18/01). Petitioner sought certiorari which was denied on May 8, 2002.

On May 7, 2003, Petitioner, through counsel, filed a motion to vacate judgment pursuant to 28 USC §2255. The motion raised three issues: (1) ineffective assistance of trial counsel for failing to file a motion for new trial after learning before sentencing that Donald DeClercq, the government's chief witness against Petitioner at trial, had allegedly attempted to bribe a police officer one week before he testified against Petitioner at Petitioner's trial; (2) ineffective assistance of trial counsel for failing to seek a departure from the guidelines based on Petitioner's status as a deportable alien; and (3) denial of due process because Petitioner's convictions were based on the unreliable testimony of Donald DeClercq.

The district court denied the §2255 motion without oral argument or an evidentiary hearing. The district court held Petitioner could not establish that the evidence of DeClercq's new criminal charge of bribery would likely produce an acquittal if the case would be retried, and Petitioner's attorney could not be ineffective for failing to move for retrial. The district court also held that the failure to request a downward departure from the guidelines based on Petitioner's status as a deportable alien was not ineffective

assistance because it was "not likely" the court would have exercised its discretion to depart from 122 months, the total sentence imposed, to 120 months. The district court also held that Petitioner's convictions were reliable despite the absence of the new evidence about DeClercq. The district court denied Petitioner a Certificate of Appealability. The district court's Order and Judgment are dated August 18, 2003 and are attached as Appendices B and C.

Petitioner filed a Notice of Appeal to the Sixth Circuit on October 17, 2003 and filed a motion for a Certificate of Appealability in the Sixth Circuit. The Sixth Circuit denied Petitioner's motion for a Certificate of Appealability in an order filed July 8, 2004. The Sixth Circuit's Order is attached as Appendix A.

REASONS FOR GRANTING THE WRIT

I. THE SIXTH CIRCUIT ERRED WHEN IT DENIED A CERTIFICATE OF APPEALABILITY ON PETITIONER'S CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL.

A Certificate of Appealability (COA) may issue if the applicant has made a substantial showing of a denial of a constitutional right. 28 USC §2253(2); *Slack v McDaniel*, 529 US 473, 484-85; 120 S Ct 1595; 146 LEd 2d 542 (2000) quoting *Barefoot v Estelle*, 463 US 880; 103 S Ct 3383, 77

LEd 2d 1090 (1983). To make a "substantial showing", Petitioner must demonstrate that "the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are 'adequate to deserve encouragement to proceed further'". *Barefoot*, 463 US at 893, fn. 4. The question is whether the district court's resolution of Petitioner's constitutional claims is debatable among jurists of reason. *Miller-El v Cockrell*, 537 US 322, 336; 123 S Ct 1029, 1039; 154 LEd 2d 931 (2003). This inquiry is not a consideration of the merits. *Miller-El*, at 338.

Petitioner has a Sixth Amendment right to the effective assistance of counsel, *Powell v Alabama*, 287 US 45; 53 S Ct 55; 77 LEd 158 (1932). To demonstrate ineffective assistance of counsel, Petitioner must show that counsel's representation fell below "an objective standard of reasonableness" and there is a "reasonable probability" that counsel's errors affected the outcome of the proceedings. *Strickland v Washington*, 466 US 668, 687-694; 104 S Ct 2052; 80 LEd 2d 674 (1984).

In the instant case, cooperating government witness Donald DeClercq testified that Petitioner solicited him to murder Dr. So Tang. There was evidence that some financial dealings between Petitioner and Dr. Tang had soured and that Petitioner and Dr. Tang's estranged wife were having an affair. Petitioner's defense at trial was that DeClercq solicited

Petitioner into the actual murder scheme, and entrapped Defendant to act in a plan orchestrated by DeClercq, because DeClercq was under federal investigation for tax fraud and possibly money laundering at the time he met Petitioner and was trying to mitigate the resolution of his own problems. DeClercq had a long history of fraud convictions. DeClercq testified that Petitioner solicited him to murder Dr. Tang and DeClercq, "good citizen" that he was, promptly notified federal authorities and then began cooperating with the authorities in an investigation of Petitioner. DeClercq testified that his attorney told him that Petitioner's alleged overtures to murder Dr. Tang were the best thing that could have happened to DeClercq since he was the target of a federal criminal investigation into his own tax defalcations and any actions as a cooperating witness against Petitioner would be extremely helpful in resolving his own criminal case. DeClercq also testified that the federal agents told him that as long as all Petitioner did was talk about murdering Dr. Tang there was no crime, and some action by Petitioner was required if he was to be arrested. Some of DeClercq's conversations with Petitioner were recorded as part of the investigation, but several conversations were not. The calls which were not recorded were the initial conversations between Petitioner and DeClercq and several later conversations wherein DeClercq called Petitioner after a period of months during which Petitioner had stopped contacting DeClercq. DeClercq's credibility and his willingness to do

criminal acts if he thought they were in his own best interests were the most critical issues at trial. After trial, but before Petitioner's sentencing, Petitioner's trial attorney learned from the Government that DeClercq had been charged in state court with attempted bribery of a police officer for allegedly offering money to the officer to return or destroy evidence from DeClercq's latest theft and stolen property case. Petitioner's trial attorney failed to file a motion for new trial after receiving this information. At sentencing, Petitioner's trial attorney failed to seek a downward departure from Petitioner's guidelines on the basis that Petitioner is a deportable alien.

Petitioner was denied the right to effective assistance of counsel when his attorney failed to move for a new trial after learning that DeClercq was charged with attempting to bribe a police officer the week before DeClercq testified against Petitioner. The district court said this newly discovered evidence was only impeachment and insufficient to produce an acquittal if the case were retried. However, this evidence was not just impeachment It was evidence that DeClercq was committing crimes even against the police and even as he was waiting to testify as the Government's chief witness against Petitioner. This evidence supported the crux of Petitioner's defense that DeClercq had importuned and pressured Petitioner into committing the charged solicitation, which Petitioner had abandoned, in an effort to help himself

and then lied to the federal authorities about Petitioner's role in the events. Because Petitioner's attorney failed to seek a new trial on this issue, Petitioner was deprived of the ability to have the jury consider DeClercq's attempted bribery of the police officer, and to determine when the bribery came to the attention of the government and whether the government violated its obligations under *Brady v Maryland*, 373 US 83 (1963) or *Kyles v Whitley*, 514 US 419 (1995). This is a substantial showing of the denial of the right to effective assistance of counsel. 28 USC §2253(2). This issue is debatable among jurists of reason.

Petitioner was also denied effective assistance of counsel at sentencing. Failure to request a downward departure from the guidelines may be ineffective assistance of counsel. *United States v Soto*, 132 F3d 56, 58-59 (DC Cir., 1997). Petitioner's guidelines for his convictions were 121-151 months. The statutory minimum sentence for Petitioner's offenses was 120 months. Petitioner is a non-citizen and will be deported for these convictions. Petitioner's chief trial attorney was a California attorney admitted *pro hac vice* to practice in Petitioner's defense in the Eastern District of Michigan. The Ninth Circuit, the home circuit of Petitioner's trial and appellate attorneys, clearly permitted departures from the guidelines on the basis of status as a deportable person. See: *United States v Charry Cubillos*, 91 F3d 1342 (9th Cir., 1996). Although the Sixth Circuit had not directly addressed

a departure on this basis, one panel decision released prior to Petitioner's sentencing "assumed" that the district court could properly depart on this basis. *United States v Arefin*, 225 F3d 660 (Table, 6th Cir., 2000). While Petitioner's §2255 petition was pending in the district court, the Sixth Circuit decided *United States v Camejo*, 333 F3d 669 (6th Cir., 2003) holding that the district court had discretion to depart from a guideline sentence based upon the defendant's status as a deportable non-citizen.

The district court stated that it was "not likely" that it would have departed from its sentence of 122 months to 120 months on the basis of Petitioner's status as a deportable alien, and Petitioner's trial attorney was not ineffective for failing to raise this basis for a downward departure. The district court's refusal to grant a downward departure is not reviewable. However, without holding an evidentiary hearing and without evaluating any argument, the district court could only say that it was "not likely" that it would have departed to 120 months. Petitioner contends that with an evidentiary hearing the district court might have departed one month from the low end of Petitioner's guidelines, 121 months, to 120 months, the statutory mandatory minimum for Petitioner's offenses. While one month may not seem like much to the district court, any potential increase in incarceration is prejudice for purposes of *Strickland*. *Glover v United States*, 531 US 198, 203; 121 S Ct 698, 700; 148 LEd 2d 604 (2001).

Petitioner received ineffective assistance of counsel when his attorney failed to seek a downward departure on the basis that Petitioner is a deportable alien. Petitioner has made a substantial showing of the denial of his right to effective assistance of trial counsel. 28 USC §2253(2); *Slack* 529 US at 484. This issue is debatable among jurists of reason.

II. THE SIXTH CIRCUIT ERRED WHEN IT DENIED A CERTIFICATE OF APPEALABILITY ON PETITIONER'S CLAIM THAT HIS CONVICTION VIOLATED DUE PROCESS.

Criminal proceedings must be resolved with fundamental fairness and reliable testimony. *Foster v California*, 394 US 440, 442, fn. 2; 89 S Ct 1127, 1129, fn. 2; 22 LEd 2d 402 (1969); *Raheem v Kelly*, 257 F3d 122, 133 (2 nd Cir., 2001). Petitioner has a Due Process right to a verdict based on reliable evidence. *Manson v Braithwaite*, 432 US 98, 112-114; 97 S Ct 2243; 53 LEd 2d 140 (1977). Due Process is not satisfied when a conviction is based, even in part, on unreliable or suspect evidence. The government's primary witness, DeClercq, had a long history of criminal conduct. This history was placed before the jury by Petitioner's trial attorney. What the jury did not hear was the evidence that DeClercq had attempted to bribe a police officer one week before he testified against Petitioner. This was an obstruction of justice. The jury was never told that DeClercq may have

been obstructing justice while they were gathering in the jury room for the start of Petitioner's trial.

Petitioner's right to due process and fundamental fairness was denied when Petitioner was not granted a new trial. The standard for obtaining a new trial based on newly discovered evidence presupposes that all of the elements of an accurate and fair proceeding were present in the challenged trial. *United States v Johnson*, 327 US 106, 112; 66 S Ct 464, 466; 90 LEd 562 (1946). But Petitioner's trial was not an accurate and fair proceeding because the jury was not informed that DeClercq, the Government's star witness against Petitioner, was willing to obstruct justice by attempting to bribe a police officer in order to assist himself. DeClercq's testimony about the substance of the unrecorded telephone conversations between himself and Petitioner was a critical piece in the Government's case against the defense claim of entrapment. The substance of the unrecorded conversations was a credibility contest between Petitioner and DeClercq. Had the jury known that DeClercq was willing to obstruct justice by offering a bribe to a police officer, they may well have concluded that he was equally willing to testify falsely under oath. Petitioner has made a substantial showing that his convictions were obtained in a fundamentally unfair trial. In *Raheem v Kelly*, the Second Circuit granted a certificate of appealability and habeas relief in a case where the trial evidence of identification was u nreliable because

fundamental fairness requires that identification evidence be reliable. 257 F3d 122 (2nd Cir., 2001), cert denied sub nom., *Donnelly vs. Raheem*, 534 US 1118 (2002). The Sixth Circuit erred in denying a COA on this issue. The resolution of this issue is debatable among jurists of reason.

CONCLUSION

Petitioner has made substantial showings of the denial of his right to effective assistance of counsel and that his verdict does not comport with due process. Reasonable jurists could debate the district court's conclusions and could resolve the issues in a different manner and these questions deserve further proceedings. The Sixth Circuit erred in denying Petitioner a COA on either or both claims. A Writ of Certiorari should issue.

Respectfully Submitted,

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filed 08/19/03 ..... B1 - B8

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filed 08/19/03 ..... C1-C1

APPENDIX A

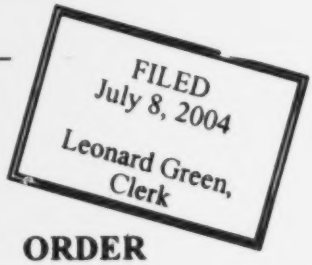
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER, FILED JULY 8, 2004

A-1 through A-3

No. 03-2433

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT



KEITH WAI KEUNG NG,	)	
ALSO KNOWN AS KEITH ENG,	)	
Petitioner - Appellant,	)	
	)	
v.	)	**ORDER**
	)	
UNITED STATES OF AMERICA,	)	
Respondent - Appellee.	)	

Keith Wai Keung Ng, also know as Keith Eng, a federal prisoner proceeding through counsel, appeals a district court judgment denying his motion to vacate, set aside, or correct sentence, pursuant to 28 U.S.C. § 2255. Ng has applied for a certificate of appealablity. *See* Fed. R. App. P. 22(b)(1).

Ng was convicted by a jury of three counts of use of interstate commerce facilities in the commission of murder-for-hire, in violation of 18 U.S.C. § 1958. Ng was sentenced to 120 months imprisonment on Count 1, and one year of imprisonment on Counts 2 and 3, to be consecutively served with each other and Count 1, for a total of 122 months' imprisonment. Ng was also sentenced to three years of supervised release on each count, to be concurrently served. We affirmed his conviction, and the Supreme Court denied

certiorari. *United States v. Ng*, 00-2098, 2001 WL 1631416 (6th Cir. 2001) (unpublished), cert. denied, 535 U.S. 1035 (2002).

Ng moved the district court to vacate his conviction, pursuant to 28 U.S.C. § 2255, arguing that (1) he was denied his right to due process because the primary witness for the government provided unreliable testimony; (2) he received ineffective assistance of trial counsel because trial counsel did not move for a new trial based upon newly discovered evidence; and (3) he received ineffective assistance of trial counsel because trial counsel did not seek a downward departure based upon his alien status. The district court denied Ng's motion to vacate and denied him a certificate of appealability.

To obtain a certificate of appealability, an applicant must make a substantial showing of the denial of a constitutional right. See 28 U.S.C. § 2253 (c)(2). To satisfy this standard, a petitioner must demonstrate "that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell,* 537 U.S. 322, 327 (2003).

Ng fails to meet this standard for reasons stated by the district court that his right to due process was violated and that he received ineffective assistance of counsel for counsel's failure to move for a new trial and to seek a downward

departure for his alien status. Accordingly, his application for a certificate of appealability is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green

Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

ORDER DENYING § 2255 MOTION FOR WRIT OF HABEAS CORPUS AND DENYING CERTIFICATE OF APPEALABILITY, FILED AUGUST 19, 2003

B-1 through B-8

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

FILED
August 19, 2003
Eastern District
of Michigan

KEITH WAI KEUNG NG,
A/K/A KEITH ENG,
Petitioner,

vs.

Case No. 03-CV-71749
Criminal No. 99-CR-81170
Hon. George Caram Steeh

UNITED STATES OF AMERICA,
Respondent.

_____/

ORDER DENYING § 2255 MOTION FOR WRIT OF HABEAS CORPUS AND DENYING CERTIFICATE OF APPEALABILITY

Petitioner Keith Wai Keung Ng moves for a writ of habeas corpus under 28 U.S.C. § 2255 challenging his conviction and sentence on the basis of ineffective assistance of counsel and a due process challenge to the use of the testimony of Donald DeClercq. Oral argument would not significantly aid the decisional process. Pursuant to E.D. Mich. Local R. 7.1(e)(2), it is ORDERED that the motion be resolved without oral argument. For the reasons set forth below, petitioner's motion for a writ of habeas corpus under 28 U.S.C. § 2255 will be **DENIED**.

The circumstances underlying petitioners's sentence and conviction are set forth in *United States v. Ng*, 00-2098, 2001 WL 1631416 (6th Cir. Dec. 18, 2001). Following a jury trial, petitioner was convicted on March 23, 2000 on three

counts of using interstate commerce facilities with intent to commit a murder-for-hire in violation of 18 U.S.C. § 1958. Petitioner was sentenced on September 11, 2000 to 120 months imprisonment on Count I, one month imprisonment on Count II, to run consecutive to Count I, and one month imprisonment on Count III, to run consecutive to Count II. Petitioner was also sentenced to three years of supervised release following his release from imprisonment, and was ordered to pay $7,000.00 in restitution. The sentencing guidelines range was calculated as 121 months to 151 months, with a supervised release range of not more than three years. Petitioner's conviction and sentence were affirmed on December 18, 2001. *Ng*, 2001 WL 1631416, at **10.

Petitioner now moves for a writ of habeas corpus under 28 U.S.C. § 2255 arguing his retained counsel were ineffective because: (1) they failed to move for a new trial under Rule 33 based on newly discovered evidence after discovering prior to sentencing that a Government witness, Donald DeClercq, had been arrested and charged with attempted bribery of police officer shortly before DeClercq testified at trial, and; (2) they failed to request a downward departure at sentencing based on petitioner's status as a deportable alien. Petitioner further argues he was denied due process of law because his convictions are based, in part, on DeClercq's testimony, rendered unreliable by defense counsels' failure to challenge the testimony using DeClercq's most recent attempted bribery charge.

A federal prisoner may move the district court which imposed sentence to vacate, set aside or correct the sentence upon the grounds that the sentence was imposed in violation of the Constitution or laws of the United States, that the court was without jurisdiction to impose such a sentence, that the sentence was in excess of the maximum authorized by law, or that the sentence is otherwise subject to collateral attack. 18 U.S.C. § 2255.

I. Evidence of DeClercq's State Arrest for Bribery or Attempted Bribery

Petitioner's convictions on the three counts of using interstate commerce facilities with intent to commit a murder-for-fire are based in part on the testimony of DeClercq, whom petitioner hired to murder a Dr. So Tang. *Ng*, 00-2098, 2001 WL 1631415, at **1. At trial, defense counsel challenged DeClercq's credibility using DeClercq's extensive criminal record, referring to DeClercq's prior state guilty plea to being a habitual criminal offender. Defense counsel also challenged DeClercq's credibility on cross-examination with the possibility that DeClercq could be facing his own federal money laundering charges. After petitioner's March 23, 2000 conviction, the Government provided defense counsel with a May 18, 2000 letter signed by the prosecuting Assistant United States Attorney:

> I am writing to follow up on our telephone conversation yesterday. As I informed you, I have learned that Mr. Donald DeClercq has

> been charged in a new matter in Oakland County, Michigan.
>
> The case name is People v. Donald DeClercq, Case No. 00-20274. I believe that the charge is bribery or attempted bribery of a public official.

It is undisputed that the bribery charge is unrelated to petitioner's instant federal charges.

"In making a motion for a new trial based on newly discovered evidence the defendant must show that the evidence (1) was discovered only after trial, (2) could not have been discovered earlier with due diligence, (3) is material and not merely cumulative or impeaching, and (4) would likely produce an acquittal if the case were retried." *United States v. Barlow*, 693 F.2d 954, 966 (6th Cir. 1982), *cert. denied*, 461 U.S. 945 (1983). Evidence of DeClercq's arrest on state charges of bribery or attempted bribery is merely cumulative to the other criminal charges used at trial in an effort to impeach DeClercq's testimony. This evidence of yet another state criminal charge brought against DeClercq would not likely have brought an acquittal had the case been retried with this evidence.

Petitioner's argument that his conviction is rendered unreliable with the absence of DeClercq's latest arrest being placed into evidence is without merit. *Raheem v. Kelly*, 257 F.3d 122 (2d. Cir. 2001), relied upon by petitioner, involved a challenge to the reliability of pretrial identification testimony. An eyewitness to a robbery/murder identified the

Raheem defendant based in part on the fact that the defendant was wearing a leather jacket, just as the assailant had been wearing a leather jacket. *Id.* At 126-127. The *Raheem* court applied a two-part test to the lineup-identification challenge: whether the procedure used was unduly and unnecessarily suggestive, and if so, whether the identification was nonetheless independently reliable. *Id.* At 133. The Sixth Circuit applies the same two-part test to out-of-court pretrial identifications. *See Ledbetter v. Edwards* , 35 F.3d 1062, 1070-72 (6th Cir. 1994). In the case at bar, petitioner's identity was not at issue, and DeClercq did not identify petitioner from a pretrial lineup as the man that had solicited DeClercq to murder Dr. So Tang. Petitioner's conviction was not rendered unreliable for due process purposes by the absence of cumulative impeachment evidence going to DeClercq's criminal history. *Barlow*, 693 F.2d at 966. It follows that petitioner has not shown deficient performance or prejudice on the part of defense counsel in failing to move for a new trial based on "new evidence." *See Strickland v. Washington*, 466 U.S. 668, 687 (1984).

II. Failure to Request a Downward Departure at Sentencing Based on Petitioner's Status as a Deportable Alien

Prior to petitioner's September 11, 2000 sentencing, the Sixth Circuit assumed based on *United States v. Ebolum*, 72 F.3d 35, 37 (6th Cir. 1995) and *Koon v. Untied States*, 518 U.S. 81, 96 (1996), and "relevant precedent from our sister circuits," that a district court enjoyed discretion to grant a

downward departure due to a defendant' alien status. *United States v. Arefin*, No. 99-3448, 2000 WL 977303, at **4, **4 n.2, 3 (July 6, 2000). Finding that the district court had recognized this discretion in denying the *Arefin* defendant's request for a downward departure based on his alien status, the Sixth Circuit affirmed the denial, recognizing that the decision was not appealable as a consequence of the district court's exercise of discretion. *Id.* at **4 (citing *United States v. Buchanan*, 207 F.3d 344, 355 (6th Cir. 1999)). Recently, the Sixth Circuit reaffirmed that a district judge enjoys discretion to grant a downward departure based on an alien's pre-offense incarceration. *United States v. Camejo*, No. 01-1572, 2003 WL 21467217 (6th Cir. June 26, 2003) (remanding for resentencing where district court failed to recognize it enjoyed discretion to grant a downward departure based on the defendant's alien status).

The question before this court is whether defense counsel rendered ineffective assistance at petitioner's sentencing by failing to move for a downward departure at sentencing. *See Garcia v. United States*, No. 99-1134, 2000 WL 145358 (6th Cir. Feb. 2, 2000). Petitioner argues his "attorneys seriously erred in not seeking a downward departure to 120 months, the statutory minimum for Petitioner's offenses." Petitioner's May 7, 2003 Brief, at 6. Petitioner was sentenced to 120 months on Count I, another one month on Count II, and another one month on Count III. It is not likely that the court would have exercised its discretion by reducing petitioner's total sentence of 122

months to 120 months - effectively sentencing defendant to concurrent 2 month sentences for two separate acts of using interstate commerce facilities with intent to commit a murder-for-hire - on the basis of petitioner's alien status and asserted consequences of being confined in a more restrictive facility, not being released to a halfway house to serve the last six months of his sentence, an automatically higher security level, "disqualification from certain programs within prison," and mandatory release to the custody of the Attorney General. In short, petitioner has failed to show a requisite prejudice resulting from defense counsels' failure to move for a downward departure of two months based on petitioner's alien status given the seriousness of the charged crimes, and the defense counsel's success in achieving a 122 month sentence in the face of a guideline range of 121 months to 151 months. "Counsel's strategy of pressing stronger arguments at sentencing was reasonable at the time and cannot be considered constitutionally deficient performance." *Garcia*, 2000 WL 145358, at **2. On this record, petitioner has not shown deficient performance or prejudice on the part of defense counsel in failing to move for a downward departure based on petitioner's alien status. See *Strickland*, 466 U.S. at 687.

III. Conclusion

For the reasons set forth above, petitioner Keith Wai Keung Ng's motion for a writ of habeas corpus under 28 U.S.C. § 2255 is hereby **DENIED**. Before petitioner can appeal this court's decision, a certificate of appealability must issue. 28 U.S.C. § 2253(c)(1)(B); Fed. R. App. P. 22(b). A certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Petitioner has made no such showing. Accordingly, a certificate of appealability is hereby **DENIED**.

SO ORDERED

/s/ George Caram Steeh
GEORGE CARAM STEEH
United States District Judge

Dated: 18 AUG 2003
Detroit, Michigan.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

JUDGMENT, FILED AUGUST 19, 2003

C-1 through C-1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

KEITH WAI KEUNG NG,
A/K/A KEITH ENG,
Petitioner,

vs.

Case No. 03-CV-71749
Criminal No. 99-CR-81170
Hon. George Caram Steeh

UNITED STATES OF AMERICA,
Respondent.

_____/

FILED
August 19, 2003
Eastern District of
Michigan

JUDGMENT

Pursuant to the court's opinion and order of even date denying petitioner's motion for habeas relief under 28 U.S.C. § 2255,

IT IS ORDER AND ADJUDGED that judgment hereby is **GRANTED** in favor of the respondent. Petitioner Keith Wai Keung Ng's § 2255 petition is hereby **DISMISSED**.

Dated at Detroit, Michigan, 18 August 2003.

DAVID J. WEAVER
CLERK OF COURT

By: /s/ Illegible
Deputy Clerk